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Never-ending Achmea Saga: A New Episode from Lithuanian Courts Confirms That Intra-EU BITs Are Really Over

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A recent decision of the Lithuanian Supreme Court (Civil case No. e3K-3-121-916/2022, 18 January 2022, hereinafter the "LSC judgement") adds another episode to the long saga of implementing the ***Achmea* decision**. The Lithuanian decision once again confirms the end of the BITs era in Europe and turns to national courts as well as to the classic conflict of laws rules. It also falls in line with a number of other decisions of the EU member states' courts.

The Background to the National Proceedings

On 10 February 2016, Veolia Environnement S.A., Veolia Energie International S.A., UAB Vilniaus energija, UAB Litesko (together – "Veolia") initiated an ICSID investment arbitration case against the Republic of Lithuania regarding the alleged breach of the 1992 Bilateral Investment Treaty (BIT) between France and Lithuania .

The Republic of Lithuania submitted a counterclaim in the abovementioned investment arbitration case on 17 September 2017. After the Court of Justice of the EU's ("CJEU") decision in *Achmea*, the Republic of Lithuania concluded that the ICSID tribunal lacked jurisdiction, withdrew its counterclaim, and submitted it to the national courts as a separate claim.

On 6 August 2020, the court of first instance refused to register this new claim. The Appellate court overturned the decision and decided to remand the case for further proceedings on 9 March 2021. Veolia challenged the decision of the Appellate court *inter alia* on several principal grounds:

First, the agreement to arbitrate the investment dispute was concluded on 10 February 2016, when Veolia accepted the offer expressed in the BIT and submitted the claim to the ICSID. Therefore, *Achmea* cannot affect the validity of the concluded arbitration agreement.

Second, referring the question of the registration of the claim to the national court infringes the *competence-competence* power of the tribunal to decide on its own jurisdiction.

Third, the implications of *Achmea* decision are overextended to different proceedings that should be protected by Article 53 – 54 of the ICSID Convention, Article 54 of the Vienna Convention on the Law of Treaties, Articles 15-16 of the BIT and Article 351 of the Treaty on the Functioning of the European Union.

The Supreme Court's Decision

In a decision dated 18 January 2022, the Lithuanian Supreme Court restated the reasoning of *Achmea*, *Komstroy* (C-741/19) and *PL Holdings* (C-109/20) and concluded that the jurisprudence of the CJEU is consistently developed toward the prohibition of intra-EU investment arbitrations (LSC judgement, para 42). The Lithuanian Supreme Court underscored that (i) ICSID is not a court of an EU member state; (ii) ICSID awards are not under the control of the EU courts; (iii) *ratio decidendi* of the *Achmea* decision should be applicable in the case at hand (LSC judgement, para 43).

Therefore, the Lithuanian Supreme Court was checking the jurisdiction of the national court at the moment of the registration of the claim through a two-prong test.

First, the Court assessed factors relevant for the registration of the new claim in a national court, *i.e.* the legal effect and temporal validity of the *Achmea* decision and the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union of 29 May 2020.

The Lithuanian Supreme Court in its reasoning referred to the practice of the CJEU that the interpretation which the CJEU gives to a rule clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its entry into force (C-24/86 *Blaizot and Others*, C-402/03 *Skov and Bilka*, C-92/11 *RWE Vertrieb*) (LSC judgement, para 45). This inevitably affects the legal relationships arising before the interpretation, unless this effect is restricted by the judgment itself, which was lacking in the *Achmea* decision (LSC judgement, para 47).

As a consequence of the CJEU practice and the interpretation of the *Achmea* decision, since 1 May 2004, when Lithuania joined the EU, Lithuanian BITs with other EU member states did not contain a valid offer to arbitrate disputes and it could not have been accepted by an investor – investment arbitration could not proceed in the absence of the agreement to arbitrate (LSC judgement, para 50).

The entry into force of the Agreement for the Termination of Bilateral Investment Treaties between the EU member states did not affect these conclusions, because the invalidity of investment arbitration was caused by the *Achmea* decision, not the agreement to terminate BITs (LSC judgement, para 50).

Hence, the Court held that the prohibition of investment arbitration between EU member states existed at the moment of the registration of the claim. The bilateral investment treaty between Lithuania and France cannot be applicable when it contradicts the EU law, thus there was no valid arbitration agreement, which could prevent the registration of the claim at the national court (LSC judgement, para 51).

The Future of this Case and Investment Arbitration in Europe

This decision of the Lithuanian Supreme Court became a Pyrrhic victory for the claimant because

upon return of the case to the first instance court, the latter refused to accept the claim, arguing that it lacked jurisdiction as the respondent companies are domiciled in France. The basis for refusal looks doubtful because two co-respondents are companies registered in Lithuania, the business activities were conducted in Lithuania for a number of years and contractual obligations were performed in Lithuania. Therefore, it is highly likely that we will observe the second round of legal procedures up to the Lithuanian Supreme Court on the most basic question: whether to register the initial counterclaim as a new case or not.

When reflecting on the foreseeable future of investment arbitration in Europe, we cannot ignore the critics of *Achmea*, *Komstroy* and *PL Holdings* line of reasoning, who argue that the CJEU got it all wrong by pitting EU law against international investment law. The substantive critique often is based on the premise that national courts are not equipped, nor suitable, to hear investment disputes and that the EU law is too weak and inadequate to protect the interests of investors in comparison to the BITs and ISDS.

However, it may be that the ISDS in Europe has become a victim of its own success. Investment arbitration was brilliant at isolating private business complaints from competing societal concerns and so successful at getting the monetary remedies for any interference with private rights. International environmental issues, human rights, health and safety concerns and even proper functioning of the market were left lightyears behind the development of international investment law in terms of accessibility of legal remedies and efficiency.

Probably for some, it comes as a surprise that EU law, in general, refused to play the role of a weakling when confronting ISDS, which is quasi-private, despite having the initial authorization in BITs. Probably international investment law met its equal in the CJEU which jealously guards its own powers, the effectiveness of EU law and the delicate balance of societal interests within the EU.

Both EU law and international investment law are relatively young, as both emerged after WWII. Both are the product of international treaties and compete for superiority against each other. EU law is holistic in the sense that it regulates a wide variety of subject areas and consequently protects a variety of interests, unlike international investment law, which concerns only investments. EU law mimics national law and has an institutional advantage over international investment law because the CJEU can ensure continuity for law development. Meanwhile, ISDS is still mostly *ad hoc* with limited *jurisprudence constante.*

The Multilateral Investment Court proposed and advocated by the EU could be a solution in the current situation. With proper procedural and institutional safeguards maybe the CJEU could accept requests from the Multilateral Investment Court for preliminary reference rulings eliminating the very reason behind the *Achmea* decision.

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